Supreme Court, U

No. 92-1455

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The National Association of Mutual Insurance Companies ("NAMIC") is comprised of more than 1200 companies throughout the United States that underwrite all forms of insurance, including homeowners' insurance. Founded in 1895, NAMIC exists to promote a financially stable, competitive private insurance industry. In 1991, NAMIC member companies were responsible for almost

$59 billion in direct written premiums for property and casualty insurance alone, representing approximately 26 percent of that business nationwide.

The Seventh Circuit's decision in this case, if allowed to stand, will disrupt profoundly the manner in which the insurance business has been regulated and conducted in this nation for nearly fifty years. That decision creates a new rule that federal regulation does not "invalidate, impair, or supersede" state law within the meaning of the McCarran-Ferguson Act if it can be construed as "parallel" to state regulation. This novel reading of the McCarran-Ferguson Act effectively overturns Congress' careful apportionment of roles for the federal and state governments with respect to the regulation of the business of insurance. It sanctions for the first time the use of federal laws that Congress never specifically applied to the business of insurance to attack insurance practices permitted under state law. Thus, the decision's impact extends far beyond the specific issues in this case and will disrupt the business of many insurance companies, including the members of NAMIC, and the services they provide to the public.

For this reason, and because the Seventh Circuit decision creates a split in the Courts of Appeals regarding the application of the Fair Housing Act to insurance, *see Mackey* v. *Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984), NAMIC and its members have a strong interest in urging this Court to grant the petition for writ of certiorari in this case, and ultimately to reverse the Seventh Circuit's decision.

SUMMARY OF ARGUMENT

This Court should review the decision below in order to correct a seriously erroneous interpretation of the McCarran-Ferguson Act and to resolve the resulting conflict between the federal Courts of Appeals concerning whether the Fair Housing Act applies to the business of

insurance. The Seventh Circuit's revolutionary construction of the McCarran-Ferguson Act will have extremely deleterious consequences for the insurance industry and the system of state regulation that traditionally has governed it.

The Seventh Circuit erroneously held that the Fair Housing Act, which does not specifically address insurance, merely "duplicates" Wisconsin's insurance law and thus may coexist with it without invalidating, impairing, or superseding the State's law within the meaning of the McCarran-Ferguson Act. By so holding, the Seventh Circuit has invited a disruption of the scheme that Congress enacted, nearly a half-century ago, for regulation of the business of insurance. If future judicial decisions apply the Seventh Circuit's rule, a wide range of federal laws that seem to parallel state insurance laws may be held applicable to insurance and, when so applied, effectively will emasculate the ability of the states to achieve a balance among state policies that affect insurance regulation.

The Seventh Circuit ignored the plain meaning of the terms "invalidate," "impair," and "supersede" in the McCarran-Ferguson Act, as well as the legislative history supporting that plain meaning. Contrary to the Seventh Circuit's opinion, those terms do not simply mean "conflict" in the narrowest sense. As repeatedly recognized by this Court and the lower federal courts, application of a federal law to the business of insurance may "invalidate, impair, or supersede" state insurance laws even absent a blatant conflict, by undermining state choices about the nature of and methodology for achieving insurance regulatory goals. In this case, the application of the Fair Housing Act to the business of insurance in Wisconsin has that effect by, for example, threatening the Wisconsin scheme for both preventing discrimination in the provision of property insurance and ensuring broad availability of such insurance through state insurance pools. This is because such insurance pools could be attacked, under

jurisprudence endorsed by nine of the federal Circuits, including the Seventh Circuit, as having a "disparate impact" on groups protected under the Fair Housing Act.

To prevent the decision below from effectively reversing Congress' determination regarding state primacy in the regulation of insurance, without any support from judicial precedent, NAMIC respectfully submits that this Court should grant American Family's petition for a writ of certiorari.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION SERIOUSLY UNDERMINES THE PRIMACY OF STATE REGULATION OF INSURANCE THAT CONGRESS ESTABLISHED IN THE McCARRAN-FERGUSON ACT.

The McCarran-Ferguson Act, enacted by Congress in 1945, established the primacy of the states in the regulation of the business of insurance. It states: "*No* Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance."[1] 15 U.S.C. § 1012(b) (1988) (emphasis added). Insurance companies and state insurance regulators have acted in reliance on this fundamental rule. In this case, the Seventh Circuit has defied legal precedent and policy by holding that the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3631, applies to the business of insurance, even though (1) the FHA and its legislative history nowhere indicate that the statute is in-

[1] The term "law enacted by any State" is understood to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." *See* 29 U.S.C. § 1144(c)(1) (1988) (Employee Retirement Income Security Act). *See also* 27 U.S.C. § 214(11) (1988) (Federal Alcohol Administration Act ("state law" includes "state statutes, regulations, and principles and rules having the force of law")).

tended to apply to the business of insurance [2] and (2) the application of the FHA to the business of insurance necessarily will interfere with several state laws regulating the business of insurance generally and prohibiting insurance redlining practices specifically.

The crux of the Seventh Circuit's reasoning is that the FHA and the Wisconsin laws regulating discrimination by insurers are parallel rather than inconsistent, and therefore the FHA does not "invalidate, impair, or supersede" Wisconsin insurance law. Although the Seventh Circuit identified a fundamental difference between the state and federal remedies authorized under these statutes, it nevertheless held that the FHA did not, by virtue of this difference, "invalidate, impair, or supersede" the state law. *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 295 (7th Cir. 1992).

As is discussed below (*infra* at 8-12), the Seventh Circuit's premise as to the relationship between the FHA and Wisconsin law is wrong. There is more at issue here than differing penalties in the state and federal statutes: there are conflicts in the purportedly parallel regulatory schemes that go to the basic questions of what conduct by insurers will be deemed actionable and which officials, state or federal, will have the authority to make judgments regarding such conduct. State regulation in this area reflects the integration of state goals and policies over which "duplicate" federal regulation will ride roughshod, a result that the McCarran-Ferguson Act was enacted specifically to prevent.

By rejecting this reality, the Seventh Circuit's decision provides the foundation for similar decisions permitting the application of other federal laws to the business of

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[2] As explained in American Family's Petition for a Writ of Certiorari ("Petition"), the FHA does not, by its terms, apply to the business of insurance, and the legislative history of the FHA confirms the plain meaning of the statute. *See* Petition at 12-14.

insurance that are superficially consistent with state regulation but that in fact will disrupt the state's chosen regulatory system.[3] Thus, the decision threatens to sweep aside long-standing practices in insurance regulation and the conduct of the business of insurance.

Had Congress intended the consequences of the Seventh Circuit's decision, all that it had to do, at any of several opportunities, was to add a single word to the FHA.[4] In the absence of such congressional action, this Court should not allow such revolutionary consequences to occur without review. Review is particularly critical in light of the weakness of the foundation upon which the Seventh Circuit's new view of the McCarran-Ferguson Act is based.

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[3] For example, under the Seventh Circuit's reading of the McCarran-Ferguson Act, a federal statute such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, which authorizes private rights of action for treble damages and recovery of attorney fees in cases involving fraudulent use of the mails or wires, might be used to challenge solicitations of insurance, even though the states pervasively regulate insurance solicitation practices. Following the rationale of the Seventh Circuit, as long as RICO simply seems to create a more powerful weapon for use against practices otherwise subject to state regulation, it could apply to "the business of insurance."

[4] Congress specifically rejected attempts to amend the FHA to cover property insurance in 1980, 1983, 1986, and 1988. *See* 126 Cong. Rec. 31,696, 32,350-51, 32,353, 32,991-92 (1980) (objections to H.R. 5200, 96th Cong., 2d Sess. (1980)); S. 1220, 98th Cong., 1st Sess. (1983); H.R. 3482, 98th Cong., 1st Sess. (1983); S. 2040, 99th Cong., 2d Sess. (1986); H.R. 4119, 99th Cong., 2d Sess. (1986); *compare* H.R. 1158, 100th Cong., 1st Sess. (1987) (specifically referring to hazard insurance) *with* Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 619 (1988) (omitting mention of hazard insurance).

II. THE SEVENTH CIRCUIT WRONGLY INTERPRETED AND APPLIED THE McCARRAN-FERGUSON ACT.

A. The Seventh Circuit Misinterpreted the Plain Meaning of the McCarran-Ferguson Act.

As this Court recently emphasized in *Reves* v. *Ernst & Young*, —— U.S. ——, 113 S. Ct. 1163 (1993), the first task for a court in construing the scope of a statutory provision is to examine the plain language of the statute. If that language is unambiguous, then it should be deemed conclusive, assuming there is no clearly expressed legislative intent to the contrary. *Id.* at 1169.

The Seventh Circuit has misapplied that basic rule of statutory construction in this case. Its reading of the McCarran-Ferguson Act fails to acknowledge the plain meaning of the terms "invalidate," "impair," and "supersede."

"Impair" means "[t]o make worse, less valuable, or weaker." "Invalidate" means "to destroy the validity or strength of . . .; to render of no force or effect; esp., to deprive of legal efficacy." "Supersede" means "to render superfluous or unnecessary; to preclude the necessity of; . . . to make of no effect." *Oxford English Dictionary* (compact ed. 1971). Not just one, but each of these definitions accurately describes the effect of the FHA on Wisconsin law regulating the business of insurance.[5]

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[5] Even if the plain meaning of the terms "impair," "invalidate," and "supersede" did not so clearly establish that the McCarran-Ferguson Act precludes application of the FHA in this case, the legislative history of the McCarran-Ferguson Act would confirm that conclusion. *See Reves*, 113 S. Ct. at 1170-72 (discussing how legislative history supported understanding of statute's plain meaning). The Act was designed to "affirm the intent of the Congress that the regulation of the business of insurance remain within the control of the several States." H.R. Rep. No. 873, 78th Cong., 1st Sess. 1 (1943). Significantly, the House Judiciary Committee re-

B. The Seventh Circuit Ignored the Manner in Which the Fair Housing Act, If Applied to Insurance, Would Invalidate, Impair, or Supersede Wisconsin Laws and Regulations.

Wisconsin law explicitly prohibits discrimination by "person[s] in the business of insuring against hazards, by refusing to enter into, or by exacting different terms, conditions or privileges with respect to, a contract of insurance against hazards to a dwelling." Wis. Stat. Ann. § 101.22(2)(e) (West 1992). The state law also explicitly forbids racial discrimination by casualty insurers. Wis. Stat. Ann. § 628.34(3) (West 1992). Since the FHA generally duplicates the mandates of these state laws, it makes the state laws "unnecessary," and therefore "supersedes" them. *See supra* at 7 (definition of "supersede").

The Wisconsin statutes prohibiting discrimination in the business of insurance, taken together, constitute a single manifestation of the state's regulatory goals on the issue. The application of the FHA to the business of insurance interferes with the methods by which the state has chosen to meet these goals. For example, it "render[s] of no force or effect" Wisconsin's choice to preclude private rights of action in redlining cases.[6]

The FHA and the Wisconsin insurance antidiscrimination laws collide, moreover, on the crucial issues of what

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jected the Department of Justice's insistence that the federal government should be able to interfere with state insurance regulation whenever it deemed such regulation to be inadequate. The Committee maintained that "[i]f the states are to be permitted to regulate, they should be permitted to regulate as they see fit." *Id.* at 7.

[6] *See Kranzush* v. *Badger State Mut. Casualty Co.*, 307 N.W.2d 256, 268-69 (1981) (discussing intent of Wisconsin legislature and regulatory authorities to limit enforcement of state law forbidding "unfair" insurance practices to administrative officials).

conduct is actionable and who shall have the burdens of proof and persuasion at trial. Nine of the federal circuits, including the Seventh Circuit, *see Metropolitan Housing Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (1977), *cert. denied*, 434 U.S. 1025 (1978), permit a claim under the FHA to rest on proof of disparate impact.[7] Under Wisconsin insurance law, however, discrimination cannot be established absent proof of disparate treatment, *i.e.*, intent to discriminate. *See American Family*, 978 F.2d at 292-93.

This fundamental discrepancy between federal and state law is consequential for precisely the reasons acknowledged in the Seventh Circuit's opinion: the very "nature of insurance" requires insurers to discriminate as to risks. As the Seventh Circuit recognized: "Insurance works best when the risks in the pool have similar characteristics. . . . To curtail adverse selection, insurers seek to differentiate risk classes with many variables." *Id.* at 290. Such differentiation, based solely on the identification of risks and without regard to race, may lead to less advantageous policies (such as those with higher premiums or deductibles) for some insurance customers, or to the decision

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[7] *See Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934 (2d Cir.), *review declined in relevant part*, 488 U.S. 15, 18 (1988); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 986-88 (4th Cir. 1984); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Keith* v. *Volpe*, 858 F.2d 467, 482-84 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989); *Elliot* v. *City of Athens*, 960 F.2d 975, 981 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 376 (1992); *compare with Asbury* v. *Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989) (requiring proof of discriminatory intent). This Court has yet to decide whether proof that a practice has a disparate impact, absent evidence of disparate treatment, may suffice to establish a violation of the FHA. *Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988).

that some would-be customers are uninsurable. Engaging in risk differentiation, which is integral to the business of insurance, could, under the Seventh Circuit's decision, render insurers vulnerable to charges of disparate impact discrimination—simply for doing what is inherent in the "nature of insurance."

The incongruity of that result is particularly stark in states such as Wisconsin that have established Fair Access to Insurance Requirements ("FAIR") plans.[8] Congress specifically encouraged the states to establish FAIR plans pursuant to the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), a statute enacted just three months after the adoption of the FHA. Pub. L. No. 90-448 §§ 1101-1102, 82 Stat. 555-556 (1968). UPPRA created incentives for insurers and state regulators to address the issue of access to basic property insurance, including, in a number of states, homeowners' insurance. In enacting UPPRA, Congress envisioned the preservation of the basic structure of state-regulated insurance rating systems based on cost-based rate classifications, including territorial factors.

If the Seventh Circuit rule applies, policyholders who obtain insurance through FAIR plans could claim, in federal court, that insurers have discriminated against them in violation of the FHA by offering them insurance under a FAIR plan rather than under regularly marketed policies.[9] If such a federal claim were successful, the state courts and insurance regulators could be estopped from making their own findings that better reflect the

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[8] *See* Wis. Stat. Ann. § 619.01 (West 1992); Wis. Admin. Code § Ins 4.10 (April 1992).

[9] Ironically, such a claim would involve attacking a mechanism (the FAIR plan) designed to make property insurance available, when the very objective of the FHA is "making available" residential real estate.

state's statutory and regulatory priorities.[10] Moreover, if such a claim were brought in any of the nine Circuits that read the FHA as authorizing proof of discrimination based on a showing of disparate impact, the claim might be established merely through an analysis of the race (or other protected classification) of the urban area residents served by the FAIR plan.

The FAIR plans serve an important, mutual state and federal goal: to provide, on a subsidized basis, basic property insurance in urban areas under the supervision of state insurance regulators. The application of the FHA would threaten—"impair," if you will—the FAIR plans and therefore the ability of the states to achieve this goal. *See Fireman's Ins. Co.* v. *Washington*, 483 F.2d 1323, 1331 (D.C. Cir. 1973) (application of anti-discrimination regulation to property insurance conflicts with FAIR plan's "equitable distribution of the hazards posed by . . . high-risk properties among private insurers."). Simply labeling the state and federal regulatory schemes as parallel or consistent masks the serious potential for erosion of state initiatives such as the formation and implementation of the FAIR plans.

The Seventh Circuit itself has conceded that "[u]ndoubtedly there is a sense in which any overlap between state and federal law upsets a balance struck by one of the two legislatures." *American Family*, 978 F.2d at 295, *citing Gade* v. *National Solid Wastes Management Ass'n*, —— U.S. ——, 112 S. Ct. 2374, 2385-86 (1992). The court further noted that "[o]ne could say that a federal rule increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of a violation) conflicts with a decision by the state that remedies should be limited or rare." *American Fam-*

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[10] *See Ward* v. *Harte*, 794 F. Supp. 109, 118 (S.D.N.Y. 1992) (finding defendant in private suit under federal law to be collaterally estopped from challenging previous county regulatory finding of housing discrimination).

ily, 978 F.2d at 295. Yet the Seventh Circuit refused to recognize the extent to which the imbalance and conflict it noted are "impairments" within the meaning of the McCarran-Ferguson Act.

C. The Rationale of the Seventh Circuit for Its Interpretation and Application of the Act Is Inconsistent with This Court's Precedents.

The Seventh Circuit's new construction and application of the McCarran-Ferguson Act is inconsistent with this Court's previous consideration of the regulatory system established by the Act. For example, in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 68 (1959), this Court expressed "a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements." *See also Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946) ("[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance . . . by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future [federal] legislation."); *FTC* v. *National Casualty Co.*, 357 U.S. 560, 563 (1957) (McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate [insurance companies'] advertising practices in those States which are regulating those practices under their own laws," without any exception for "parallel" regulation).

The Seventh Circuit's narrow view of the McCarran-Ferguson Act is also at odds with well-established principles of preemption. In *Gade* v. *National Solid Wastes Management Ass'n*, —— U.S. ——, 112 S. Ct. 2374 (1992), this Court rejected an argument that is echoed in the Seventh Circuit's rationale here. In *Gade*, the peti-

tioner argued that the Occupational Safety and Health Act does not preempt "nonconflicting state laws because those laws, like the Act, are designed to promote worker safety." *Id.* at 2385. In turning that argument aside, this Court wrote:

> In determining whether state law "stands as an obstacle" to the full implementation of a federal law, . . . "it is not enough to say that the ultimate goal of both the federal and state law" is the same. . . . "A state law also is preempted if it *interferes with the methods* by which the federal statute was designed to reach th[at] goal."

Id. (emphasis added) (citations omitted). For precisely the reason articulated in that statement by this Court in *Gade*, the Seventh Circuit's narrow reading of the McCarran-Ferguson Act is fundamentally flawed, and threatens to turn the Act's well-understood function on its head without justification.

CONCLUSION

For all the foregoing reasons, NAMIC respectfully submits that the Court should grant American Family's petition for a writ of certiorari.

Respectfully submitted,

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